TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 12, 1941.

CERTIORARI GRANTED FEBRUARY 9, 1942.

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. C-531-(8)

Lands Added to 1868 Reservation

THE SIOUX TRIBE OF INDIANS, Consisting of the Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota; the Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*

[fol. 2] I. SEPARATED AMENDED PETITION

Original Petition Filed May 7, 1923

Separated Amended Petition Filed May 7, 1934

To the Honorable Chief Justice and Judges of the Court of Claims:

Now come the plaintiffs, the Sioux Tribe of Indians, consisting of the Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota; the Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the Sioux Tribe of the Santee Indian

Reservation in the State of Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana; and for their Petition respectfully show:

I

That an Act of Congress, approved June 3, 1920 (41 Stat. 738), authorizes the Sioux Tribe of Indians, or any band thereof, to bring a suit or suits against the United States, the defendant herein, under any treaties, agreements or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and said act is in words and figures as follows, to wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have [fol. 3] not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject,

however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court [fol. 4] may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians.

"Sec. 3. That upon the final determination of such suit, cause, or action the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of [fol. 5] such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause."

II

That the defendant has and does recognize plaintiffs as the Sioux Tribe of Indians, and has and does recognize as bands of the Sioux Tribe of Indians the Indians of the Indian Reservations hereinbefore named.

III

That plaintiffs have entered into a contract with Ralph H. Case and C. C. Calhoun, attorneys-at-law of Washington, D. C., under date of September 11, 1922, whereby said attorneys are duly authorized to represent them, the plaintiffs, and to file this suit in their behalf, and that said contract has been duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior on December 21, 1922.

That on July 13, 1932, said Ralph H. Case and C. C. Calhoun assigned an interest in the above mentioned contract to Kingman Brewster, J. S. Y. Ivins, and Rice Hooe, attorneys-at-law of Washington, D. C., and that said assignment has been duly approved by the Commissioner of Indian Affairs on July 20, 1932, and by the First Assistant Secretary of the Interior on July 21, 1932.

[fol. 6] IV

That article II of the treaty of April 29, 1868 (15 Stat. 635) provided as follows:

"The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing,

with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

[fol. 7]

V

That by Executive Orders dated January 11, 1875 (1 Kap. 898), March 16, 1875 (1 Kap. 884), May 20, 1875 (1 Kap. 898), and November 28, 1876 (1 Kap. 884), the President of the United States, pursuant to the aforesaid provisions of article II of the treaty of 1868, added to the permanent reservation and made a part thereof certain lands as in said Executive Orders described, and that by such acts the plaintiffs, who were then and theretofore occupants of said area, became possessed of a title of exactly the same extent and quality as the title of plaintiffs to the lands west of the Missouri River described in said article II of said treaty, that is to say, a title in fee.

VI

That thereafter on August 9, 1879 (1 Kap. 899) and March 20, 1884 (1 Kap. 884), Executive Orders were issued by the President of the United States restoring to the public domain certain of the lands heretofore described in paragraph V above, totaling in area 5,667,016.74 acres, and that from and after the dates of said Executive Orders, to wit: August 9, 1879, and March 20, 1884, plaintiffs have been excluded from and denied the use of all of said area. That the aforesaid Executive Orders of August 9, 1879, and March 20, 1884, *supra*, were in violation of the rights and a misappropriation of lands of the plaintiffs and that defendant by its military forces removed plaintiffs from the area so misappropriated by force and arms.

VII

That the land so misappropriated was reasonably worth [fol. 8] $1.25 per acre at the respective dates of the taking thereof, and that there is now due and owing to the plaintiffs as just compensation for the taking of such lands $7,083,770.93, together with interest thereon from and after the respective dates of misappropriation.

Wherefore, the premises considered, the plaintiffs pray:

That this petition be considered by the Court and judgment entered in favor of the plaintiffs for the sum of $7,083,770.93 with interest and the costs of this action.

For such other and further relief as to the Court may seem just and proper in the premises.

The Sioux Tribe of Indians,

Consisting of:

The Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Standing Rock Indian Reservation in the States of South Dakota and North Dakota.

The Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Lower Brule Reservation in the State of South Dakota.

The Sioux Tribe of the Santee Indian Reservation in the State of Nebraska.

[fols. 9-10] The Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana.

Ralph H. Case, Kingman Brewster, J. S. Y. Ivins, C. C. Calhoun, Rice Hooe, *Attorneys in Fact.*

Duly sworn to by Ralph H. Case. Jurat omitted in printing.

[fols. 11-12] II. General Traverse—Filed June 16, 1934

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein

contained; and asks judgment that the amended petition be dismissed.

Carl McFarland, Assistant Attorney General.

G.T.S.

III. Argument and Submission of Case

On October 9, 1940, argument of the case on merits was begun by Mr. Ralph H. Case for plaintiff, and by Mr. George T. Stormont for defendant.

On October 10, 1940, argument was concluded and case submitted on merits by Mr. George T. Stormont for defendant, and by Mr. J. S. Y. Ivins and Mr. Ralph H. Case for plaintiff.

[fol. 13] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whaley, Chief Justice**—Filed April 7, 1941

Messrs. J. S. Y. Ivins and Ralph H. Case for the plaintiff. Mr. Richard B. Barker was on the briefs.

Mr. George T. Stormont, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. Under authority of the act of June 3, 1920 (c. 222, 41 Stat. 738), the plaintiff, which constitutes the Sioux tribe named therein, through its duly authorized attorneys, filed its petition in this court on May 7, 1923, and on May 7, 1934, filed its separated and amended petition upon the alleged cause of action here involved.

2. By a treaty between the United States and various tribes and bands of the Sioux Nation concluded in the year 1868 and ratified by the Senate of the United States on February 16, 1869, a certain "district of country" was "set apart for the absolute and undisturbed use and occupation of the Indians herein named." Article II containing this stipulation is as follows:

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the

[fol. 14] Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided. (15 Stat. 635, 636.)

3. Under the article of the treaty above cited, the Great Sioux Reservation extended to low-water mark on the east bank of the Missouri River and included two small existing reservations on the east bank of the River, thus leaving open for settlement a large tract of country bordering on the east bank of the Missouri. The ready access to the Great Sioux Reservation thus afforded was taken advantage of by white men who infested the country for the purpose of carrying on the liquor traffic. In 1874 and 1875 this traffic had gained such proportions that the Commissioner of Indian Affairs deemed it necessary to take some positive steps to suppress it. Accordingly, on January 8, 1875, he recommended to the Secretary of the Interior that the President be requested to issue an order withdrawing from sale and setting apart

for Indian purposes a certain described tract of country, this action "being deemed necessary for the suppression of liquor traffic with the Indians upon the Missouri River," [fol. 15] and enclosed with his recommendation a draft of the requested order.

The Secretary concurred in the recommendation and on January 9, 1875, forwarded the Commissioner's recommendation to the President, together with the draft of the proposed order, and recommended that it be signed, "the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River."

The suggested order was signed by the President on January 11, 1875, and is as follows:

Executive Mansion,
January 11, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

The Commissioner of Indian Affairs thereupon on January 14, 1875, transmitted copies of this order to the agents at the agencies along the Missouri River, advising them that the land described in the order had been withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation, "the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River."

Lying within the limits of the lands described in the Executive Order were the lands of the old Winnebago Reservation and the Crow Creek Reservation, which had been established pursuant to the provisions of the acts of February 21, 1863, and March 3, 1863. Exclusive of the acreage embraced in these two reservations, the lands included in

the Executive Order of January 11, 1875, measured approximately 5,151,130.48 acres.

4. On February 15, 1875, a number of settlers residing upon the lands embraced in this Executive Order presented [fol. 16] a petition to the President asking that the order be so modified as to permit them to remain upon their improvements until compensation had been made to them by the Government. The matter was referred to the Commissioner of Indian Affairs for action, who replied under date of March 23, 1875, in part, as follows:

In reply I would respectfully state, that the object of the order in question, is to enable the suppression of the liquor traffic with the Indians on the Missouri River.

This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn. There will be no interference with the legitimate business pursuits of any persons lawfully residing within the said limits.

The communication from the President transmitting said petition is, herewith, respectfully returned.

In April 1875 certain citizens of Buffalo County, Dakota Territory, petitioned for damages in consequence of the Executive Order of January 11, 1875, having withdrawn from settlement the lands occupied by them and reserved them for the use of the Indians. By direction of the Secretary of the Interior, the petitioners were informed by the Commissioner of Indian Affairs that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country but to prevent the introduction of whiskey into the reservation, and the agents were instructed to restrain the Indians from molesting the settlers on the lands covered by the Executive Order.

5. On March 13, 1875, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the President be requested to withdraw from sale and set apart for Indian purposes a further described tract, stating that the recommendation was made for the same reasons expressed in his recommendation of January 8, 1875. A draft

of the suggested order accompanied his recommendation. The Secretary concurred in the recommendation and forwarded the Commissioner's letter and draft of the order to the President, requesting that it be signed, "the same being deemed necessary for the suppression of the liquor [fol. 17] traffic with the Indians at the Standing Rock Agency." The order was signed by the President on March 16, 1875, and is as follows:

Executive Mansion,
March 16, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following-described boundaries, viz, commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

Copies of this order were transmitted to the various agents on the Great Sioux Reservation by the Commissioner of Indian Affairs on March 19, 1875, with the statement that the addition to the Great Sioux Reservation was "deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency." A similar notification was sent to the Commissioner of the General Land Office.

The area described in this Executive Order measured approximately 784,893.32 acres.

6. On May 13, 1875, the Secretary of War transmitted to the Secretary of the Interior for his information a letter from the officer in command of the Southern District of the

Military Department of Dakota. In this letter the officer in question called attention to the fact that there was a small tract of land opposite the Sioux Reservation on the east side of the Missouri River, just north of the Fort Randall Military Reservation, which was not included in any reservation and which afforded "a very nice point for whiskey sellers and horse thieves," and stated that if this [fol. 18] tract could be embraced within some reservation the Missouri River from Choteau Creek to the forty-sixth parallel would be entirely free from the presence of whiskey sellers and the condition of the Indians would be better. The matter was referred to the Commissioner of Indian Affairs by the Secretary of the Interior for "consideration and recommendation," with the comment that the suggestions were deemed worthy of adoption.

On May 18, 1875, the Commissioner acknowledged the reference, recommended that an Executive Order be issued withdrawing the tract in question from sale and setting it apart for Indian purposes, and enclosed a draft of the proposed order. On May 19, 1875, in a letter to the President the Secretary of the Interior stated that he concurred in the enclosed recommendation of the Commissioner of Indian Affairs and requested that the draft of the order be signed. The order was signed by the President on May 20, 1875, and is as follows:

Executive Mansion,
May 20, 1875.

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

Copies of the order were transmitted by the Commissioner of Indian Affairs to the agents at the Crow Creek, Cheyenne River, and Yankton agencies for their information.

The lands covered by this order measured approximately 111,648.31 acres.

7. By letter dated November 7, 1876, Captain R. E. Johnston of the 1st Infantry, Acting Indian Agent at the Standing Rock Agency, notified the Commissioner of Indian Affairs that numbers of white men were settled along the north bank of Beaver River in the vicinity of the agency; that these men made a business of selling liquor to the Indians and ammunition both to the Indians on the reserva- [fol. 19] tion and to the hostile Sioux, and that their presence was a source of constant trouble and annoyance, and recommended that the described tract be made an Executive addition to the reservation as soon as possible so that the illegal traffic carried on therein "may be stopped."

In a letter to the Secretary of the Interior, dated November 24, 1876, the Commissioner of Indian Affairs, concurring in Captain Johnston's recommendation, recommended that the President be requested to sign the enclosed draft of order withdrawing from sale and settlement and adding to the Sioux Reservation the lands therein described, "with a view to the suppression of this traffic" and stated:

The adoption of this order will effectually cut off these whiskey dealers, in their nefarious traffic, from all approach to the Missouri river, from the Yankton Agency to Bismarck. It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract.

In a letter dated November 28, 1876, addressed to the President, the Secretary of the Interior enclosed the Commissioner's recommendation, with the statement that he approved of it and the reasons therefor, and requested that the President sign the enclosed draft of the necessary order.

The order was signed by the President on November 28, 1876, and is as follows:

Executive Mansion,
November 28, 1876.

It is hereby ordered that the tract of country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct

line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

[fol. 20] The Commissioner of Indian Affairs was advised of the President's action on December 13, 1876, and on the same day addressed a letter to the agent at Standing Rock Agency, enclosing a copy of the Executive Order and stating that the lands had been added to the Sioux Reservation "with a view to the suppression of the liquor traffic upon the Missouri River between the aforesaid points," and that the addition "is not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits." On the same date the Commissioner notified the Commissioner of the General Land Office of the issuance of the order and stated that the boundaries of the reservation had been thus extended "with a view to the suspension of the liquor traffic upon the Missouri river from Beaver river to Fort Rice military reservation."

The lands covered by this order measured approximately 120,247.02 acres.

8. On June 6, 1879, in a letter to the Secretary of the Interior, the Commissioner of Indian Affairs, reporting upon a request for a modification of the eastern boundary of the Sioux Reservation as fixed by the Executive Orders of January 11 and May 20, 1875, so as to permit access to the Missouri River by the settlers who were rapidly locating in that part of the Territory of Dakota, stated the facts and circumstances leading to the issuance of the Executive Orders in question. He recited the fact that by the treaty of April 29, 1868, a large area of country on the east bank of the Missouri River was thrown open to settlement, thus affording ready access to the Indians upon the reservation, which circumstance was taken advantage of by white men who infested the country for the purpose of carrying on the

liquor traffic; that in 1874 and 1875 this traffic had gained such proportions that it was deemed necessary to take some positive steps to suppress it; that accordingly the Executive Orders of January 11 and May 20, 1875, were issued extending the eastern boundary of the reservation to the ninety-ninth degree of west longitude from the forty-eighth parallel (sic, should be "forty-sixth") of North latitude to the Missouri River and including a small tract of country [fol. 21] lying between the Yankton Reservation and the Missouri River; that these orders effectually cut off all unlawful communications with the Indians and to a great extent accomplished the object desired, that is, the prevention of the sale of liquor to the Indians; that to restore to the public domain all or any part of the lands bordering on the Missouri River and set apart by the Executive orders referred to would reopen and give renewed life to this unlawful traffic and be detrimental to the best interests of the Indians, and therefore declined to recommend any change in or modification of the reservation boundaries.

By letter dated June 27, 1879, the Commissioner of Indian Affairs advised the Secretary of the Interior that the matter of restoring the lands set apart as additions to the Sioux Reservation by the Executive orders of January 11, March 16 and May 20, 1875, and November 28, 1876, to the public domain had been given careful reconsideration and he had reached the conclusion that the lands involved, with certain exceptions, could be so restored and the interests of the Indians still be protected. The Commissioner recited that the lands had been set apart for the purpose of preventing illegal liquor traffic with the Indians and that at the date they were so set apart there was no law providing a punishment for the sale of liquor to the Indians "except to Indians in the Indian country," but that by reason of the act of February 27, 1877 (19 Stat. 244), "persons who now engage in liquor traffic with the Indians, no matter in what locality, are liable to a penalty of $300 and two years' imprisonment, and therefore the necessity for so large a reservation for the protection of these Indians in this respect does not now exist." The Commissioner further stated that the Indians "at the Crow Creek and Lower Brulé Agencies are protected by the Winnebago and Crow Creek Reservations established by treaties" and that the Indians at the Cheyenne, Grand River, and Standing Rock

Agencies could be sufficiently protected by excepting from the order restoring the lands to the public domain certain described small tracts on the east bank of the Missouri River opposite the respective agencies, and enclosed with [fol. 22] the letter a draft of the proposed order. The requested order was signed by the President on August 9, 1879, and is as follows:

Executive Mansion,
August 9, 1879.

It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east

bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-[fol. 23] ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

R. B. Hayes.

The lands embraced within this order measured approximately 5,562,035.45 acres.

The Commissioner of the General Land Office was notified of the President's action by the Secretary of the Interior on August 11, 1879.

9. On March 8, 1884, Senator Angus Cameron in a letter to the Secretary of the Interior called his attention to the small tract of land opposite the mouth of the Grand River which had been excepted from the order of restoration to the public domain of August 9, 1879, stated that there was not and had not been for a long time a single Indian on the tract, that the Indians did not seem to know it had not been restored to the public domain, and that the settlers upon the land adjoining the tract were very desirous that it be thrown open to settlement, and requested that he inquire into the matter. The Senator's letter was referred to the Commissioner of Indian Affairs and, on March 14, 1884, the commissioner replied, stating that he had before him in addition to Senator Cameron's letter, two petitions "numerously signed by settlers praying for the restoration of the lands opposite Grand River and Cheyenne River agencies." The Commissioner reviewed the situation, stat-

ing that the Executive Orders of January 11, March 16, and May 20, 1875, and November 28, 1876, withdrawing from sale and settlement certain tracts of country east of the Missouri River and setting them apart as additions to the Great Sioux Reservation, had been made for the purpose of suppressing liquor traffic with the Indians on the reservation, and that by the subsequent Executive Order of August 9, 1879, all the territory so withdrawn, with the exception of [fol. 24] small tracts opposite the Standing Rock Agency, the Grand River Agency, and the Cheyenne River Agency had been restored to the public domain. These three tracts, he stated, had been retained as a means of protection to those agencies. He further stated that since the order of restoration of August 9, 1879, the Grand River Agency had been discontinued and that the agents at Standing Rock and Cheyenne River agencies had reported that these Executive additions were no longer required for the purpose for which they were originally intended and recommended that they be restored to the public domain. The Commissioner then stated that having fully considered the matter he recommended that the three remaining tracts be restored to the public domain, and enclosed a draft of an Executive Order which would accomplish this. The Commissioner's recommendation was concurred in by the Secretary of the Interior and submitted to the President on March 15, 1884. The President signed the order on March 20, 1884, and the commissioner was notified of this action on March 22, 1884. The order is as follows:

Executive Mansion,
March 20, 1884.

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

Chester A. Arthur.

The three tracts thus restored to the public domain measured approximately 104,981.29 acres.

10. The aforesaid Executive Orders of 1879 and 1884 were issued for the purpose of restoring to the public domain lands which were no longer needed for the purpose for which they had been withdrawn from sale by the Executive Orders of 1875 and 1876.

11. By the Indian Appropriation act for the year 1877 Congress declared that

> • • • hereafter there shall be no appropriation made [fol. 25] for the subsistence of said Indians [i. e., the Sioux], unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, • • •. (19 Stat. 176, 192.)

A commission to carry out this provision of law was promptly appointed, proceeded to the Sioux country, and submitted to the tribe the agreement prepared by it in conformity with the terms of the act, informing the tribe that the agreement had been prepared in accordance with the conditions required by the act and that it had no authority to vary these conditions in any particular. The agreement was thereupon signed by the Indians with a full understanding on their part of the conditions imposed by the act of August 15, 1876.

By Article 1 of this agreement with the Sioux Indians of September 26, 1876, ratified by the Congress on February 28, 1877 (19 Stat. 254, 255), it was provided:

> The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence

north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

[fol. 26] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

OPINION

Whaley, *Chief Justice*, delivered the opinion of the court:

This case is one of several brought by the Sioux Nation and involves a large tract of land in the Northwest. It is agreed that it should be tried under Rule 39A which limits the hearing to the issues of fact and law relating to the right of the plaintiff to recover. The question of the extent of the recovery and the amount of set-offs are reserved for future proceedings.

In 1868 a treaty was made with the Sioux Nation which was ratified by the Senate in 1869, 15 Stat. 635, 636, whereby a certain definite tract of country was set apart for the absolute and undisturbed use and occupation of these Indians. The tract of country, so set apart, was described in Article II of the treaty, as follows:

Article II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite

where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized [fol. 27] to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

This treaty gave the Sioux Nation a permanent reservation to the lands described thereunder. The Indian Nation possessed the use and occupancy of this reservation and, as has been repeatedly held, this was equivalent to an Indian title and therefor- was in the nature of a cession by the United States of this territory to the Indian Nation. It is unquestioned that the United States retained the fee simple in all Indian lands. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Beecher* v. *Wertherby*, 95 U. S. 517.

After this permanent reservation had been made to the Sioux Nation, with the exception of two small reservations on the east bank of the Missouri River, the whole territory on the east bank became public property subject to settlement and sale.

In 1874 the Commissioner of Indian Affairs reported to the Secretary of the Interior that the liquor traffic on the Missouri River was being taken advantage of by white men

because of the ready access to the great Sioux Reservation and it was necessary to take steps to suppress it. He recommended to the Secretary of the Interior that the President be requested to issue an order withdrawing from sale and setting apart for Indian purposes a certain tract of land adjoining this Indian Reservation on the east so as to suppress the liquor traffic with the Indians upon the Missouri River. The Secretary of the Interior, agreeing with the Commissioner of Indian Affairs, recommended to the President the withdrawing of this land on the east of the permanent reservation from settlement and sale so as to protect the Indians against this injurious traffic. On January 11, 1875, the President signed an Executive Order withdrawing from settlement and sale certain lands on the east bank of [fol. 28] the Missouri River described in the order. The order stated in part, after a description of the portion withdrawn:

> • • • the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

On February 15, 1875, certain residents of the lands embraced in the above Executive Order complained about molestations by the Indians on the settlers on the lands covered by the Executive Order. As a result, on March 13, 1875, the Commissioner of Indian Affairs recommended to the Secretary of the Interior a further withdrawal from settlement and sale of certain lands, which had not been included in the previous withdrawal order, so as to suppress the liquor traffic with the Indians at the Standing Rock Agency. As a result of this recommendation of the Secretary of the Interior, the President signed on March 16, 1875, a withdrawal order describing by metes and bounds certain lands to be set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation and territory.

Following this addition to the territory set aside for the reservation of the Sioux Indians, two other tracts of land were added to the reservation of the Sioux Indians by Executive Orders of May 20, 1875, and November 28, 1876, both of these Executive Orders being based on the suggestion of the Commissioner of Indian Affairs and the recommendation of the Secretary of the Interior to suppress the liquor traffic with the Indians on the treaty reservation.

In these four Executive Orders there is the expression "use" of the several tribes and not the words "use and occupation" or "use or occupation" as expressed in the treaty. It is true that the words "as an addition to their present reservation in said Territory" are used.

These four Executive Orders took from settlement and sale 5,151,130.48 acres under Executive Order of January 11, 1875; 784,893.32 acres under Executive Order of March 16, 1875; 111,648.31 acres under Executive Order of May 20, 1875; and 120,247.02 acres under Executive Order of November 28, 1876, respectively, or a total of 6,167,919.13 acres.

In 1879, the Secretary of the Interior, who had been advised by the Commissioner of Indian Affairs, recommended [fol. 29] that the lands, with certain exceptions, so withdrawn from settlement and sale under the four orders above mentioned, could be restored to the public domain and the liquor traffic with the Indians suppressed, under the act of February 27, 1879 ,19 Stat. 244). As a result of this recommendation of the Secretary of the Interior on August 9, 1879, the President signed an order restoring a part of these lands to the public domain. The lands embraced in this order contained approximately 5,562,035.45 acres.

Upon the recommendation of the Secretary of the Interior an Executive Order was signed on March 20, 1884, restoring lands embraced within the four Executive Orders of 1875 and 1876 not included in the previous order of restoration of 1879, the lands consisting of one tract opposite the Standing Rock Agency, a tract opposite the mouth of the Grand River and a tract opposite the mouth of the Big Cheyenne River Agency. The tracts so restored to the public domain measured approximately 104,981.29 acres.

On June 3, 1920, Congress passed a special jurisdictional act (41 Stat. 738) giving the Sioux Tribe of Indians the right to sue in this court on all claims arising under any treaties, agreements, or laws of Congress, or for the misappropriation of any funds or lands of said tribe and the court the right to hear and determine all legal and equitable claims of the said tribe against the United States.

It is contended by the plaintiff that the four Executive Orders of 1875 and 1876, in which these large tracts of lands were added to the Sioux permanent reservation gave to the Sioux Nation the same title to these additional tracts as they had in the permanent reservation which was made by the

treaty with the Sioux Nation. In other words, that the expression in the Executive Orders "use" of said tribe was equivalent to "use and occupation" or "use or occupation" and constituted an Indian title to the lands and that, when the lands were taken away by the orders of 1879 and 1884, there was such a fee in the Indians, as has been recognized by the Congress and the courts, as constituted an Indian title for which compensation should be given.

We do not think it is necessary or useful for a decision in this case to recite the many acts of the Executive dealing [fol. 30] with the public lands and withdrawing them from settlement and sale and setting apart certain portions as a reservation for the wandering bands of Indians. A full history of these Executive Orders is set out in the case of the *United States* v. *Midwest Oil Company*, 236 U. S. 459.

The title to the land involved in this case was originally in the United States, and the sole question before us is whether an irrevocable conveyance was made to the Indians which divested the Government of its interest in whole or in part. It is unnecessary to go into a discussion of the question of Indian country and Indian title because it has been well settled that Indian country means not only the lands reserved for the Indian reservations but lands over which the Indians roved. Indian title simply means that where the land has been reserved by treaty, act of Congress, or Executive Order, subsequently ratified by the Congress, the Indians take such a title to the land that when the land is taken away from them they are entitled to compensation. The actual fee is always in the United States but the use of the terms "use and occupation", "use or occupation", or "occupation" carry such an equitable title in the Indians that the Congress of the United States has always recognized that compensation should be given the Indians for the lands when they are taken. *Spalding* v. *Chandler*, 160 U. S. 394; *Seneca Nation* v. *Christy*, 162 U. S. 283, 288, 289.

It has always required Congressional action for the payment to the Indians for lands so taken, either by direct action of Congress or by submission of the claim to the courts for adjudication. *Frost* v. *Wenie*, 157 U. S. 46, 50; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *United States* v. *Blendaur*, 128 Fed. 910, 913; *Ash Sheep Co.* v. *United States*, 252 U. S. 159.

There are three kinds of Indian reservations: those which were created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for the use of the Indians in order to keep them within a certain territory. By the act of June 30, 1919, the President was expressly prohibited from issuing Executive Orders creating reservations out of the public lands. (41 Stat. 3, 34.)

[fol. 31] In reference to Executive Order reservations, there was no law under which the President acted, but it has been recognized that the President issued these Executive Orders setting aside these public lands for public use under the right of the Executive to carry out the policy of preserving the public interest. The fee of any interest in these lands was never in the Executive.

The Constitution of the United States under Article 4, Sec. 3, provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. • • •"

This power to dispose of lands belonging to the United States is broadly conferred upon the Congress and it is only by legislation that the lands of the United States can be disposed of. In order to dispose of the public lands it is necessary for the Congress to take some action either by direct legislation or by conferring upon the President the power of the Congress so that he, acting as the agent of the Congress, can dispose of the lands. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504.

In the *Wisconsin Railroad Company* case, *supra*, the court said:

• • • The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 168.

In the case of *Gibson* v. *Choteau*, 13 Wall. 92, 99, the court said:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.

[fol. 32] In the case of *United States* v. *Midwest Oil Company, supra*, it was held that the President had the right to withdraw public lands from settlement and sale, due to the fact that Congress had acquiesced in and given implied sanction of such a course of action from an early period in the history of the country and has never repudiated the exercise of such power. However, the court did not intend to mean that the power of withdrawal from settlement and sale gave to the President the right of alienation of the public property. It was for the protection of the public interest that these withdrawal orders were made and not for the purpose of disposing of the public lands. The President had no right to dispose of public lands under the Constitution. In that case the court further held at page 474:

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." *Camfield* v. *United States*, 167 U. S. 524; *Light* v. *United States*, 220 U. S. 536. Like any other owner it may provide when, how, and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an "implied license growing out of the custom of nearly a hundred years." *Buford* v. *Houtz*, 133 U. S. 326. So too, in the early days the Government, by its silent acquiescence, assented to the general occupation of the public lands for mining." *Atchison* v. *Peterson*, 20 Wall. 512. If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then for a much stronger reason, an implied

grant of power to preserve the public interest would arise out of like congressional acquiescence.

It will be seen that in all these cases it was a question of withdrawal by the President of public lands from settlement and sale or the right to mineral and oil rights of public lands but in no instance can we find a statement of what interest, if any, was given to Indian Tribes in lands set apart by Executive Orders for their use where such Indian Tribes had a permanent treaty reservation. In some of the Execu- [fol. 33] tive Orders adding lands out of the public domain to Indian territory there was the express provision that they were for temporary use. (Executive Orders, October 10, 1910, and March 22, 1911.)

In the case before us, although the Executive Orders did not contain words of a temporary nature, nevertheless, the recommendation of the Commissioner of Indian Affairs to the Secretary of the Interior, on which these Executive Orders were based, showed that the additions were solely for the purpose of regulating the liquor traffic on the Missouri River and the protection of these Indians on their permanent reservation from the injurious and harmful effects of such traffic. The use of the words in the treaty "or in such territory as may be added to this reservation for the use of said Indians" clearly intended such lands which may be added thereto, either by treaty, which was the sole way by which Congress dealt with these Indian Tribes up to 1871, or by act of Congress after 1871. Congress did not intend by these words to vest in the President the fee to the public domain, or the power to dispose of the title to it, a power which was, under the Constitution, in the Congress alone. It would have required some act of Congress by prior legislation, or subsequent ratification of the Executive Orders, in order to divest the United States of its title to the land and place it elsewhere. The President was simply an agent of the Congress. Under Article II § 3, of the Constitution, authority of the President is defined as follows:

He (the President) shall take care that the laws be faithfully executed.

But this section does not give the President the right to dispose of the public lands which the Constitution has committed to Congress and shows the lack of authority in the

President to convey any interests in public domain which have not been authorized by the Congress by previous or subsequent legislation. It is the President's duty to see that the laws are faithfully executed and in this discharge of [fol. 34] his duties the public lands can be withdrawn when it is in the interest of the public.

There was never any previous authority given to the President, before these four Executive Orders were signed, to dispose of the interest of the Government in these lands nor has there been any subsequent ratification of the two withdrawal orders of 1879 and 1884 to the present date.

The Sioux Nation did not get by these four Executive Orders, adding land to their permanent reservation, any interest for which the Government is responsible either in law or in equity. The additions were of a temporary nature to serve a public interest, and, when that public interest had been served, the withdrawal orders of 1879 and 1884 were issued returning the land to the public right of settlement and sale.

The plaintiff seems to rely chiefly on the opinion of Attorney General Stone rendered in 1924 to the President and the Secretary of the Interior. (34 Op. Atty. Gen. 181). The question before the Attorney General was whether the General Leasing Act of February 25, 1920, 41 Stat. 437, applied to Executive Order Indian reservations and he held that, where public lands had been set aside by Executive Order as an Indian reservation, the Leasing Act did not apply. It is true that in this opinion the question of Executive Order reservations was discussed but it was simply to show that in treaty reservations, Congressional reservations, and Executive Order reservations, where the Indians were on the lands occupying and using them, these lands could not be leased for oil and mineral deposits. It must be borne in mind, that, when the President ordered the four additions to the Sioux reservation, the orders contained the word "use" and not "use and occupation" or "use or occupation." It has been repeatedly held, and there is no need of citing authorities it is so well established, that when the words "use and occupation" or "use or occupation" are used in setting aside Indian reservations, although the fee remains in the Government nevertheless the Indians take such an equitable interest in the lands that when the lands are taken either by Congressional action or by withdrawal by the President,

compensation has been paid to the Indians. This is not true, however, where these words have not been used and in many instances where there have been withdrawals of [fol. 35] lands from Indian reservations, which have been made by Executive Order, no compensation has been paid.

Attorney General Stone in his opinion uses the following language:

> When, by an executive order, public lands are set aside, either as a new Indian reservation or an addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an "Indian reservation;" *and so long, at least, as the order continues in force, the Indians have the right of occupancy and use and the United States has the title in fee. Spalding v. Chandler,* 160 U. S. 394; *In re Wilson,* 140 U. S. 575. [Italics ours.]

It will be seen that the Attorney General specifically states "so long, at least, as the order continues in force".

In the instant case the Executive Orders of 1875 and 1876 were withdrawn in 1879 and 1884. For over sixty years the Sioux Indians have not had the use of these lands and even during the periods from 1875 to 1879 and 1884 they had only the use which permitted hunting of buffalo and other game.

The opinion of the Attorney General must not be taken too broadly. The opinion was dealing with the General Leasing Law and its application to public lands and was rendered before the act of May 29, 1924 (43 Stat. 244) was passed. That act provided that unallotted lands on Indian Reservations, other than the Five Civilized Tribes and the Osage Reservation, were subject to leasing for mining purposes with the consent of the Council for the Indians, and the money received from the leasing of these lands belonged to the Indians but the State should have the right to tax the lands in which the leases were situate and the Secretary of the Interior was to pay the tax so assessed. It will be seen that this law provided for the unallotted lands on the Indian reservations. This clearly indicated permanent reservations made by treaty or act of Congress and not temporary reservations or additions to reservations made by the President under Executive Orders. This shows the intent of Congress to recognize one class and not to recognize the other.

[fol. 36] In *Lone Wolf* v. *Hitchcock, supra,* the Supreme Court held that the plenary power of Congress over tribal Indian property is such that the provisions in the existing treaty with the Indians could be abrogated without their consent. It was largely a question of policy for Congress to determine what interest the Indians would have in the lands.

This court has nothing to do with the moral question; that is a matter of policy and grace for the Congress. We must take into consideration all the relevant facts and circumstances surrounding the creation of the additions to the reservation in determining the character and extent of the Indian interests.

Taking all these matters into consideration, it seems clear that in issuing the Executive Orders of 1875 and 1876, which added some six million and odd acres to the Sioux treaty reservation, it was intended as a temporary expedient in order to protect the Indians from the injurious and nefarious liquor traffic, and the orders were temporary in their nature and could be withdrawn at any time and were withdrawn in 1879 and 1884.

The Sioux Indians took no interest which would entitle them to either legal or equitable relief. The petition is dismissed. It is so ordered.

Whitaker, *Judge;* Green, *Judge;* and Littleton, *Judge,* concur.

[fols. 37-38] V. JUDGMENT OF THE COURT—April 7, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fols. 39-40] VI. PROCEEDINGS AFTER JUDGMENT

On June 5, 1941, the plaintiff a motion for an extension of time to file a motion for a new trial, which was allowed by the court on June 7, 1941.

On July 3, 1941, the plaintiff filed a motion for a new trial.

On October 6, 1941, the court entered the following Order on said motion:

Order

It Is Ordered this sixth day of October, 1941, that said motion be and the same is overruled.

By the Court.

Richard S. Whaley, Chief Justice.

On November 14, 1941, plaintiff filed a request for record in re certiorari under Rule 99 (a) and 99 (b).

[fol. 41] Order Settling the Record—November 28, 1941

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above-entitled case, and both plaintiff and defendant having requested that certain portions of the evidence which are attached hereto be included in the record to be certified to the Supreme Court, and the court having found that both portions are accurate transcripts of the original record material to the errors assigned, the same are hereby this 28th day of November, 1941, approved as the record to be certified to the Supreme Court.

By the Court.

Richard S. Whaley, Chief Justice.

[fol. 42] **Portions of Record Material to Errors Assigned**

[fol. 43] [Title omitted]

Plaintiff's Request for Record in re Certiorari—Filed November 14, 1941

Comes now the plaintiff, by its attorney, and requests that the Clerk of this Court prepare and furnish the undersigned a certified transcript of the portions of the record in this case which are set out in the paper attached hereto, all of which, in his judgment, are material to the errors assigned in plaintiff's petition for writ of certiorari in this case.

Ralph H. Case, Attorney for Plaintiff, Southern Building, Washington, D. C.

[fol. 44] The following are the portions of the record requested by plaintiff to be certified as part of the transcript

on petition for certiorari in case C-531-(8), Sioux Tribe of Indians v. United States:

"Several of the commissioners are in favor of extending the country, from which the whites will be excluded (cf. Article 2 of 1868 Treaty) so as to include the Yankton Reservation and the James River country now occupied by the Yanktonais. We shall do this if we can, and if we can not, it is not probable that any commission can; and hence it is better for the Yanktonais and all Indians east of the river to trust to us." (Talks and councils held with the Indians, 1866-1869, R. p. 35.)

1873

Grand River Agency: Edmond Palmer, Agent

"As the Indians have abandoned their old farms, and moved to this place, with the exception of a portion of the Lower Yanctonai, who are encamped on the other side of the river, opposite the agency * * * On the 12th ultimo, as the Indians were ferrying their beef across the Missouri River, just above the old agency, the boat, by some accident, was overturned, and Mr. J. H. Hardie, the agency farmer, and two Indians, were drowned. It was impossible to render them any assistance, as there was no other boat at the place. The steamer 'May Lowery' passing soon after the accident, I found it necessary to engage her services in ferrying the Indians and their beef across the river." Rept. Comr. Ind. Aff. 1873, p. 231. (R. p. 270.)

1873

Cheyenne River Agency: H. W. Bingham, Agent

"The morals of the Indians of this agency are very good. They are industrious and temperate; during the fourteen months that I have been here, I have not seen or heard of an Indian under the influence of liquor." Rept. Comr. Ind. Aff. 1873, p. 232. (R. p. 270.)

[fol. 45] 1874

Cheyenne River Agency: H. W. Bingham, Agent

"I am happy to say that intemperance is comparatively unknown at this agency, and the introduction of spirituous

liquors discountenanced by myself and employes. I am beginning, however, to feel anxious in this matter, from the fact that a whisky-ranch has been established about six miles above us on the opposite side of the river, and a license for traffic in liquor granted by the Internal Revenue Department. Had I the authority which I supposed up to a late date was vested in me, I should most certainly take immediate steps to remove such a dangerous establishment, for although the Indians show no inclination to drink, still they dread the temptation to which a close proximity of liquor exposes them and so expressed themselves to me on several occasions." Rept. Comr. Ind. Aff. 1874, p. 240. (R. p. 271.)

1875

Standing Rock Agency: John Burke, Agent

"I found but one ferry-boat at the agency belonging to the Government, which, together with a yawl-boat, was kept in constant use, and proved entirely inadequate to the requirements of the service, so I had constructed by the agency employes another and more substantial ferry-boat, and now feel no inconvenience nor delay in the dispatch of agency business requiring attention on the east side of the Missouri River." Rept. Comr. Ind. Aff. 1875, p. 244. (R. p. 271.)

1876

Standing Rock Agency: John Burke, Agent

"The Indians belonging to this agency are four bands of the Sioux tribe—Upper and Lower Yanctonais, Uncpapas, and Blackfeet. Their reservation is a parallelogram formed by the forty-fifth and forty-sixth parallel [fol. 46] of north latitude, and by the ninety-ninth and one hundred and fourth meridian of west longitude, to which is added a tract of country north of the forty-sixth parallel bounded on the east and north by the one hundredth meridian and Beaver River, and on the west and north by the one hundred and second meridian and the Cannon Ball River. * * * The Lower Yanctonais have sixteen of their little farming settlements on the east side of the Missouri River." Rept. Comr. Ind. Aff. 1876, pp. 38-39. (R. p. 272.)

1878

Cheyenne River Agency: Theo. Schwan, Acting Agent

"The great majority live in five villages on the west side of the Missouri River, three of which are above and two below the agency; only about one-seventh of the entire number, the most progressive, are settled at Peoria Bottom, on the east side, 15 miles below Fort Sully. * * *

"It is generally believed that these Indians would do better if they and their agency were transferred to the east side of the Missouri River, where a part of their number are already located. While for grazing purposes there is probably but little difference in the relative value of the land on the two sides of the river, for agriculture the section on the east side of and bordering the river is in every respect preferable to that on this (the west) side. The soil is more fertile; there is less alkaline matter in it. The area of tillable land is much greater, and generally the shelter afforded on the eastern side is more extensive and easy of access than that of the bluffs opposite." Rept. Comr. Ind. Aff. 1878, pp. 20-22. (R. p. 272.)

[fol. 47] [Title omitted]

DEFENDANT'S REQUEST FOR RECORD—Nov. 22, 1941

Now comes the defendant in compliance with Rule 99(b) of this Court and files herewith an original and five copies of the parts of the evidence (other than that of which the Court takes judicial notice) which the defendant considers should become a part of the record to be certified to the Supreme Court and requests that such evidence be certified as a part of the transcript requested by plaintiff for the purpose of filing a petition for a writ of certiorari.

The parts of the evidence herewith presented and requested to be certified consist of the report of the Secretary of the Interior filed herein October 4, 1939, and enclosures here marked as exhibits 2 to 39, inclusive.

Norman M. Littell, Assistant Attorney General.

Raymond T. Nagle. George T. Stormont, Attorneys.

November, 1941.

[fol. 48] UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary, Washington

August 9, 1939.

The Honorable The Attorney General.

In re Sioux Nation v. United States. Lands added to reservation.

MY DEAR MR. ATTORNEY GENERAL:

Reference is made to the call of Mr. George T. Stormont of your Department, of June 15, in which a request was made for copies of certain papers pertaining to section 3, paragraph 6, of the original petition No. C-531 upon which a report was made to your Department on May 19, 1932. These papers were desired in connection with the preparation of the answer of your Department in case No. C-531-8.

The old papers relating to Indian Affairs have been removed from this Department to the National Archives and are now in the custody of that government facility. A careful search was made, however, by the Archives for papers bearing upon this matter and copies thereof were made and transmitted to this Department. The enclosures herewith consist of a certified and an uncertified copy of each of the following papers:

Letter from	to	Date of letter
Commissioner of Indian Affairs	H. W. Bingham	Dec. 19, 1874
" " "	Sec. of Interior	Jan. 8, 1875
Act. Sec. of Interior	President	Jan. 9, 187–(yr. not
" " "	Comm. of Ind. Aff.	Jan. 12, 1875 (stated)
Comm. of Ind. Aff.	H. F. Livingston	Jan. 14, 1875
" " "	Edmond Palmer	Jan. 14, 1875
" " "	H. W. Bingham	Jan. 14, 1875
" " "	Sec. of Interior	March 13, 1875
Sec. of Interior	President	March 15, 1875
" "	Comm. of Ind. Aff.	March 16, 1875
Comm. of Ind. Aff.	E. A. Howard	March 19, 1875
" " "	H. F. Livingston	March 19, 1875
" " "	Comm. of Gen. Ld. Off.	March 19, 1875
" " "	J. J. Saville	March 19, 1875
" " "	H. W. Bingham	March 19, 1875
" " "	Edmond Palmer	March 19, 1875
John L. Pennington, Gov. Dakota Territ.	Comm. of Ind. Aff.	April 29, 1875
Sec. of Interior	Comm. " "	May 4, 1875
Comm. of Ind. Aff.	H. F. Livingston	May 8, 1875
" " "	H. W. Bingham	May 8, 1875

[fol. 49]

Letter from	to	Date of letter
Secretary of War	Sec. of Interior	May 13, 1875
Comm. of Ind. Aff.	Sec. " "	May 18, 1875
Act. Sec. of Interior	President	May 19, 1875
Act. Sec. of Interior	Comm. of Ind. Aff.	May 21, 1875
Act. Comm. of Ind. Aff.	H. F. Livingston	May 24, 1875
" " " " "	H. W. Bingham	May 24, 1875
" " " " "	John G. Cassman	May 24, 1875
Act. Ind. Agt., Stand. Rock	Comm. of Ind. Aff.	Nov. 7, 1876
Comm. of Ind. Aff.	Sec. of Interior	Nov. 24, 1876
Sec. of Interior	President	Nov. 28, 1876
" " "	Comm. of Ind. Aff.	Dec. 11, 1876
Comm. of Ind. Aff.	Wm. T. Hughes	Dec. 13, 1876
" " " "	Comm., Gen. Ld. Off.	Dec. 13, 1876
Act. Comm. of Ind. Aff.	Sec. of Interior	June 6, 1879
Comm. of Indian Aff.	Sec. " "	June 27, 1879
Sec. of Interior	Comm. of Ind. Aff.	Aug. 11, 1879
Comm. of Ind. Aff.	Sec. of Interior	Mar. 14, 1884
Angus Cameron	" " "	Mar. 8, 1884
Act. Sec. of Interior	Comm. of Ind. Aff.	March 22, 1884

There is no information contained in the current files of this Office which we may have been able to locate bearing upon the question involved. The reports of the Commissioners of Indian Affairs from 1871 to 1889 have been examined but there has been little found therein which bears directly upon the question, and such as has been found therein appears to be more thoroughly discussed in the enclosures herewith.

Sincerely yours, Oscar L. Chapman, Assistant Secretary.

Enclosure 2200505

[fol. 50] DEFENDANT'S EXHIBIT No. 2

II January 8th, —5.

SIR:

I have the honor to recommend that the President be requested to issue an order, withdrawing from sale and setting apart, for Indian purposes, a tract of country, in the Territory of Dakota, lying within the following described boundaries, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence east with said parallel of latitude to the ninety-ninth degree of west longitude, thence south with said degree of longitude to the east bank of the Missouri river, thence up, and with, the east bank of said river to the place of beginning, the same being deemed

necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Hon. Secretary of the Interior.

[fol. 51] DEFENDANT'S EXHIBIT No. 3

Department of the Interior

Washington, D. C., Jan'y 9th, 187—.

SIR:

I have the honor to present, herewith, for the signature of the President, a draft of an Executive Order to withdraw from sale and set apart for Indian purposes the land therein described in the Territory of Dakota, as recommended by the Commissioner of Indian Affairs, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

The report of the Commissioner of the 8th instant, upon the subject, is herewith submitted.

Very respectfully, Your obedient servant, B. R. Bowen, Acting Secretary.

The President.

[fol. 52] DEFENDANT'S EXHIBIT No. 4

Department of the Interior

Washington, D. C., Jan'y 12th, 1875.

SIR:

I return, herewith, signed by the President, the draft of Executive Order setting apart certain lands, in Dakota Territory, therein described, as an addition to the Sioux reservation in said Territory which accompanied your letter of the 8th instant addressed to this Department.

Very respectfully, Your obt. servant, B. R. Bowen, Acting Secretary.

The Commissioner of Indian Affairs.

[fol. 53] DEFENDANT'S EXHIBIT No. 5

II. January 14th, ——5.

SIR:

I enclose herewith, for your information, a copy of an Executive Order dated January 11, 1875, withdrawing from sale and setting apart certain lands therein described in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota Territory.

[fol. 54] DEFENDANT'S EXHIBIT No. 6

II. January 14th, ——5.

SIR?

I enclose herewith, for your information, a copy of an Executive Order, dated January 11, 1875, withdrawing from sale and setting apart certain lands therein described—in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Edmond Palmer, Esq., U. S. Indian Agent, Standing Rock Agency, Dakota Territory.

[fol. 55] DEFENDANT'S EXHIBIT No. 7

January 14th, —5.

SIR:

I enclose herewith, for your information, a copy of an Executive Order, dated January 11, 1875, withdrawing from sale and setting apart certain lands—therein described—

in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being assured necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. W. Bingham, Esq., U. S. Indian Agent, Cheyenne River Agency, Dakota Territory.

[fol. 56] DEFENDANT'S EXHIBIT No. 8

Mch. 13th, —5.

SIR:

Referring to office report of the 8th of Jan. last, recommending the extension of the Sioux Indian reservation in Dakota, on the east side of the Missouri river, I have now to respectfully request for similar reasons; viz:—the suppression of the liquor traffic with the Indians at the Standing Rock Agency, that the President be requested to issue an order, withdrawing from sale and setting apart for Indian purposes, a tract of country in the Territory of Dakota, lying within the following described boundaries: Beginning at a point where the 102d degree of West Longitude intersects the 46th parallel of north latitude, thence north on said 102d degree of longitude, to the south bank of Cannon Ball river, thence down and with, the south bank of said river to a point on the east bank of the Missouri river, opposite the mouth of said Cannon Ball river; thence down and with, the east bank of the Missouri river to the mouth of Beaver River, thence up and with, the south bank of Beaver River to the 100th degree of west longitude, thence south with said 100th degree of longitude, to the [fol. 57] 46th parallel of latitude, thence west with said parallel of latitude to the place of beginning.

As a further reason for said request, I would respectfully state, that from the information now in my possession, it is believed that the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by treaty of April 29, 1868, [Stat. at L. Vol. 15, p. 635] but are included in the tract proposed to be withdrawn.

I enclose, herewith, a portion of a map showing the supposed location of said Agency buildings and the tract of country proposed to be withdrawn for Indian purposes, and the draft of an Executive Order covering said description.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

The Hon. Secretary of the Interior.

[fol. 58] DEFENDANT'S EXHIBIT No. 9

Department of the Interior

Washington, D. C., March 15, 1875.

SIR:

Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report, dated the 13th instant, I have the honor to request the signature of the President, to the enclosed draft of an Executive Order for the enlargement of the Sioux reservation in Dakota, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obedient servant, C. Delano, Secretary.

The President.

[fol. 59] DEFENDANT'S EXHIBIT No. 10.

Department of the Interior

Washington, D. C., March 16, 1875.

SIR:

I return herewith, signed by the President, the draft of Executive order for the enlargement of the Sioux reservation in Dakota, which was submitted with your letter of the 13th instant.

Very respectfully, Your obt. servant, C. Delano, Secretary.

The Commissioner of Indian Affairs.

[fol. 60] DEFENDANT'S EXHIBIT No. 11

March 9th.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian reservation in Dakota Territory—the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Edw. P. Smith, Commissioner.

E. A. Howard, Esq., U. S. Indian Agent, Spotted Tail Agency, White Clay, Dakota, via Fort Laramie, Wyoming.

[fol. 61] DEFENDANT'S EXHIBIT No. 12

March 10th —5.

SIR:

I transmit herewith for your information, a copy of an Executive Order dated March 16, 1875, for the enlargement of a Sioux Indian reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota Territory.

[fol. 62] DEFENDANT'S EXHIBIT No. 13

March 19th —5.

SIR:

I have the honor to transmit for your information, the following Executive Order for the enlargement of the Sioux reservation, in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

[Here follows exact copy of the Executive Order of March 16, 1875.]

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Hon. Commissioners of the Genl. Land Office.

[fol. 63] DEFENDANT'S EXHIBIT No. 14

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian Reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw P. Smith, Commissioner.

J. J. Saville, Esq., U. S. Indian Agent, Red Cloud Agency, via Cheyenne, Wyoming.

[fol. 64] DEFENDANT'S EXHIBIT No. 15

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlarg-ment of the Sioux Indian reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Edw. P. Smith, Commissioner.

H. W. Bingham, U. S. Indian Agent, Cheyenne River Agency, Dakota Territory.

[fol. 65] DEFENDANT'S EXHIBIT No. 16

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian reservation in Dakota Territory

—the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Edmond Palmer, Esq., U. S. Indian Agent, Standing Rock Agency, Dakota Territory.

[fol. 66] DEFENDANT'S EXHIBIT No. 17

Territory of Dakota

Executive Office

Yankton, Dakota, April 29, 1875.

Hon. E. P. Smith, Commissioner of Indian Affairs, Washington, D. C.

SIR:

I have the honor respectfully to submit the accompanying petition, but without any specific recommendation, for the reason that I know of no law whereby the money relief prayed for can be granted, and because as I understand it their rights of property already acquired there are not intended to be impaired by the Executive order referred to.

They allege that their immediate cause of complaint is, however, that in consequence of the order the Indians will not permit them to continue their improvements or prosecute their works of husbandry.

The petition is respectfully forwarded for such action as the government may be pleased to take thereon, if any.

I have the honor to be, Sir,

Your obedient servant, John L. Pennington, Governor.

[fol. 67] DEFENDANT'S EXHIBIT No. 18

May 4th —5.

SIR:

I transmit herewith for your information a letter dated the 27th ultimo from Gov. J. L. Pennington of Yankton,

Dakota—together with the petition of citizens of Buffalo County D. F. therein mentioned—upon the subject of damages sustained by said citizens by reason, as alleged, of Executive Order of January 11, 1875, extending Sioux reservation.

In view of the statements contained in the papers above noted you are hereby instructed to direct the proper Indian Agents to restrain the Indians and forbid their molesting the settlers—and to inform the petitioners that the views of Gov. Pennington are correct and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whisky into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your obt. servant, C. Delano, Secretary.

The Commissioner of Indian Affairs.

[fol. 68] DEFENDANT'S EXHIBIT No. 19

May 8th —5.

SIR:

I send you herewith enclosed, copy of a letter from Governor Pennington of Dakota, dated the 27th ultimo, and copy of petition enclosed by him from citizens of Buffalo County, Dakota, presenting claims for damages sustained by said citizens by reason as alleged, of Executive Order of January 11th, 1875, extending the Sioux reservation.

I also enclose copy of Department letter to this office dated the 4th instant, and in accordance with the instructions therein you are directed to restrain the Indians and forbid their molesting the settlers, and inform the petitioners that the views of Governor Pennington are correct, and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whisky into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota.

[fol. 69] DEFENDANT'S EXHIBIT No. 20

May 8th —5.

SIR:

I send you herewith enclosed copy of a letter from Governor Pennington of Dakota, dated the 27th ultimo, and copy of petition enclosed by him from citizens of Buffalo County, Dakota, presenting claims for damages sustained by said citizens, by reason as alleged, of Executive Order of January 11th, 1875, extending the Sioux reservation.

I also enclose copy of Department letter to this office dated the 4th instant, and in accordance with the instructions therein you are directed to restrain the Indians and forbid their molesting the settlers, and inform the petitioners that the views of Governor Pennington are correct, and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whiskey into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your old servant, Edw. P. Smith, Commissioner.

H. W. Bingham, Esq., U. S. Indian Agent, Cheyenne River Agency, Dakota.

[fol. 70] DEFENDANT'S EXHIBIT No. 21

War Department

Washington City, May 13th 1875.

4139.

To the Honorable, The Secretary of the Interior.

SIR:

I have the honor to transmit, for your consideration, copy of a communication from Lieut. Colonel Lugenbeel, dated, Fort Randall, Dakota Territory, April 23rd, relative to portions of the river front, near the Sioux reservation, being the resort of whisky dealers, horse thieves, &c., also that whisky is sold on a similar piece of land near the Yankton reservation, &c.

Very respectfully, Your obedient Servant, Wm. H. Belknap, Secretary of War.

[fol. 71] Copy

Headquarters Southern District, Department of Dakota

Fort Randall, D. T., April 23, 1875.

Assistant Adjutant General, Department of Dakota, Saint Paul, Minn.

Sir:

The Executive Order of January 11th, 1875, extending the Sioux Indian reservation across the Missouri river, still leaves about five miles of river front outside of any reservation.

From this point where the 99 meridian strikes the Missouri river to the upper end of this military reservation, is this strip of land, thus affording a nice point for whisky sellers and horse thieves.

There is also a small gore of land on the river between the upper end of the Yankton reservation and the lower end of the Fort Randall Military reserve, where a man named Ellis has a low whisky doggery.

If these two points could be embraced in some reservation, the river from Chateau Creek to the 46th parallel would be entirely free from the presence of whisky sellers, & the outlaws who now take refuge there would return to the States, as they could not feel contented without imbibing ardent spirits.

[fol. 72] It would also better the condition of the Indians, and the soldiers of the different garrisons would be better in health and disposition.

Very respectfully, Your obedient servant: (sd.) Pinkney Lugenbeel, Lieut. Colonel 1st Inf., Comd'g District.

[fol. 73] Defendant's Exhibit No. 22

May 18 — 5

Sir:

I have the honor to acknowledge the receipt, by reference from you, for consideration and recommendation, of a letter of 13th instant from the Hon. Secretary of War, transmitting copy of a communication from Lt. Col. Lugenbeel, dated Fort Randall, D. T. April 23, 1875, relative to the

sale of whisky at certain points on the Missouri river, not embraced in any Indian or military reservation, and suggesting that some action be taken to embrace the points in question in some reservation.

I would respectfully state that the tract of country in Dakota Territory, lying south of an East and West line from the Northwest corner of the Yankton Indian reservation to the 99th degree of West longitude; and between the Missouri river and the Yankton reservation might be embraced within the Sioux reserve, by extending its limits, by executive order, so as to cover said tract. How to reach the party named Ellis, who occupies the gore of land within the Military reservation of Fort Randall, referred to, by Col. Lugenbeel, as keeping "a low whisky doggery," would be a question more difficult of solution, inasmuch as he is one of the 19 persons reported to the Department, by the Hon. Secretary of War, under date of the 22d ultimo, as being entitled to the relief provided for by Act of Congress, entitled "An Act for the relief of certain settlers on the Fort Randall Military reservation" approved May 18, [fol. 74] 1874 [Pamph. Ed. Laws 1st Session 43d Congress, chap. 182, p. 47].

As the existing rights of Mr. Ellis would not be affected by the issue of an Executive Order extending the limits of the Sioux reserve over his claim. I can, therefore, only recommend the issue of an order by the President withdrawing from sale or settlement the first named tract of country, and setting it apart for Indian purposes. With a view to that end, I submit, herewith, a draft of such an Executive Order.

The Communication of the Hon. Secretary of War is herewith returned.

Very respectfully, your obt. servant, Edw. P. Smith,
Commissioner.

Hon. Secretary of the Interior.

[fol. 75] DEFENDANT'S EXHIBIT No. 23

Department of the Interior

Washington, D. C., May 19th, 1875.

SIR:

Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report

dated the 18th instant, I have the honor to request the signature of the President to the enclosed draft of an Executive Order, withdrawing from sale and setting apart a certain tract of country in the Territory of Dakota, therein described, as an addition to the Sioux Reservation.

I have the honor to be,

Very respectfully, your obt. servant, B. R. Cowen, Acting Secretary.

The President.

[fol. 76] DEFENDANT'S EXHIBIT No. 24

Department of the Interior

Washington, D. C., May 21st, 1875.

SIR:

I return, herewith, signed by the President the draft of Executive Order, withdrawing from sale and setting apart a certain tra t of country in the Territory of Dakota, therein described, as an addition to the Sioux Reservation, which was submitted with your letter of the 18th instant.

Very respectfully, your obt. servant, B. R. Cowen, Acting Secretary.

The Commissioner of Indian Affairs.

[fol. 77] DEFENDANT'S EXHIBIT No. 25

May 24th —5.

SIR:

I enclose, herewith, for your information and the files of your office, a copy of an Executive Order dated May 20, 1875, withdrawing a certain tract of country in the Territory of Dakota, from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian reservation.

Very respectfully, your obt. servant, H. R. Clinn, Acting Commissioner.

H. F. Livingston, Esq., U. S. Ind. Agent, Crow Creek Agency, Dak. Ter.

[fol. 78] DEFENDANT'S EXHIBIT No. 26

May 24, —5.

SIR:

I enclose herewith, for your information and the files of your office, a copy of an Executive Order, dated May 20, 1875, withdrawing a certain tract of country in the Territory of Dakota from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian Reservation.

Very respectfully, Your obt. servant, H. R. Clinn, Acting Commissioner.

H. W. Bingham, Esq., U. S. Ind. Agent, Cheyenne River Agency, Dak. Terr.

[fol. 79] DEFENDANT'S EXHIBIT No. 27

May 24, —5.

SIR:

I enclose, herewith, for your information and the files of your office a copy of an Executive Order dated May 20, 1875, withdrawing a certain tract of Country, in the Territory of Dakota, from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian reservation.

Very respectfully, your obt. servant, H. R. Clinn, Acting Commissioner.

John G. Gassman, Esq., U. S. Ind. Agent, Yankton Agency, Dak. Ter.

[fol. 80] DEFENDANT'S EXHIBIT No. 28

U. S. Indian Agency

Standing Rock, D. T.

November 7th, 1876.

To the Commissioner of Indian Affairs, Washington, D. C.

SIR:

I have the honor to state that along the North bank of Beaver River are now settled numbers of white men who

make a business of selling liquor and ammunition to the Indians thus proving a source of constant trouble and annoyance. I have, also, every reason to believe that these men sell, to the hostiles, all the ammunition they or their emissaries can purchase.

I herewith submit an outline draught of the Executive Additions to this Reservation, made in the Spring of 1875, together with a *proposed* Addition embracing a tract subscribed as follows:

Commencing at the extreme Eastern corner of the Military Reservation of Fort Rice, D. T.; thence South-westerly to the Missouri River; thence, southerly, along said River to the mouth of Beaver River; thence, North-easterly, along said Beaver River, to the North-east corner of the present Reservation; thence Westwardly to the starting-point.

I would respectfully request that the above described tract be made an Executive Addition to this Reservation as soon as possible to that the illegal traffic carried on therein may be stopped.

I am Sir

Very Respectfully, Your obedient servant, R. E. Johnston, Captain 1st Infantry, Acting Indian Agent.

[fol. 81] DEFENDANT'S EXHIBIT No. 29

November 24, 1876.

The Honorable the Secretary of the Interior.

SIR:

Under date of the 7th instant, R. E. Johnston, Capt. 1st Infantry, and Acting U. S. Indian Agent at Standing Rock, D. T., reports that along the north bank of Beaver River are now settled numbers of white men who make a business of selling liquor and ammunition to the Indians, thus proving a source of constant trouble and annoyance at the Agency. He is, moreover, led to believe, these are the parties who are supplying the hostile Indians with all the ammunition they can purchase. With a view to the suppression of this traffic, I have the honor to recommend that the President be requested to issue an order withdrawing

from sale or settlement all that tract of country, in Dakota, on the East side of the Missouri river, lying within the following boundaries, viz: commencing at a point on the South bank of the Beaver River, intersected by the 100th degree of West Longitude, thence in a direct line to the East corner of the Fort Rice Military reservation, thence southwestwardly along the line of said Military reservation to the east bank of the Missouri river, thence with the East bank of the Missouri to the mouth of Beaver river, thence up and with the south bank of Beaver river to the place of beginning.

The adoption of this order will effectually cut off these [fol. 82] whisky dealers, in their nefarious traffic, from all approach to the Missouri river, from the Yankton Agency to Bismarck. It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract. I submit herewith a draft of such order and a diagram furnished by Capt. Johnston, showing the tract in question.

I have the honor to be

Very respectfully, J. Q. Smith, Commissioner.

Stand. Rock J. 1052.

[fol. 83] DEFENDANT'S EXHIBIT No. 30

Department of the Interior

Washington

November 28th, 1876.

Sir:

I have the honor to submit herewith a letter dated 24th instant from the Commissioner of Indian Affairs, recommending the withdrawal from sale or settlement and setting apart for Indian purposes a certain tract of country in Dakota together with the reasons therefor..

A draft of Executive Order to effect the purpose indicated, which has the approval of this Department, is also herewith respectfully submitted.

I have the honor to be, Sir,

Very respectfully, Your obedient servant, Z. Chandler, Secretary.

The President.

[fol. 84] DEFENDANT'S EXHIBIT No. 31

Department of the Interior

Washington

December 11, 1876.

SIR:

Referring to your report of 24th ultimo upon the subject of withdrawing from sale certain land in Dakota on the East side of the Missouri River, I transmit, herewith, an Executive Order, dated 28th ultimo, withdrawing from sale and setting apart for the use of the Sioux, and as an addition to their present reserve in Dakota, the tract of land therein described.

Very respectfully, Your obt. servant, Z. Chandler, Secretary.

The Commissioner of Indian Affairs.

[Copy of Order of Nov. 28, 1876 attached.]

[fol. 85] DEFENDANT'S EXHIBIT No. 32

December 13, —6.

Wm. F. Hughes, U. S. Indian Agent, Standing Rock Agcy., Dakota.

SIR:

Referring to letter of Captain R. E. Johnston, dated the 7th ultimo, I transmit, herewith, for the files of your office, a copy of an Executive Order, dated November 28, 1876, setting apart the tract of country east of the Missouri River between Beaver River and Fort Rice, as an addition to the Sioux Reserve with a view to the suppression of the liquor traffic upon the Missouri River between the aforesaid points. This order does not affect and is not intended to interfere with the vested rights of any settlers upon this tract or with the legitimate business pursuits of any person lawfully residing within its limits.

Very respectfully, J. Q. Smith, Commissioner.

Dakota I 1126.
Standing Rock I 1052.

[fol. 86] DEFENDANT'S EXHIBIT No. 33

December 13, ——6.

The Commissioner of the General Land Office.

SIR:

I have the honor to advise you that the boundaries of the Sioux Indian Reservation in Dakota, have been extended on the East side of the Missouri river with a view to the suspension of the liquor traffic upon the Missouri river from Beaver River to Fort Rice military reservation by the order of the President, of which the following is a copy.

"Executive Mansion"

"November 28, 1876.

"It is hereby ordered that the tract of country in the Territory of Dakota, on the east side of the Missouri river lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver river intersected by the 100th degree of West Longitude thence in a direct line to the east corner of the Fort Rice military reservation, thence in a south western direction along the said military reservation to the east bank of the Missouri river, thence with the east bank of the Missouri to the mouth of Beaver river thence up and with the south bank of Beaver river to the place of beginning be and the same hereby is withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

[fol. 87] Very respectfully, Your obt. servant, J. Q. Smith, Commissioner.

Dakota I 1126-76

[fol. 88] DEFENDANT'S EXHIBIT No. 34

373 "L" 2 enclosures

Dakota

"L" 856. 1879 June 6, ——9.

The Honorable, The Secretary of the Interior.

SIR:

I have the honor to acknowledge the receipt, by your reference for report, of a communication dated Cleveland,

Ohio, the 28th ultimo, from John W. Street, Esqr, in reference to the formation of a colony for homestead settlement in Brule and Cragin Counties, Dakota Territory, and in which he requests a modification of the eastern boundary of the Sioux Indian Reservation as fixed by Executive Orders of January 11, and May 20, 1875, so as to establish a line or door-way of communication by the Missouri River in Southern Dakota, for the settlers who are now rapidly locating in that part of the Territory. This office is also in receipt of a letter, herewith, from Mr. Street dated the 8th ultimo upon the same subject.

The treaty of April 29th, 1868 (Stat. 15, p. 635) defines the eastern boundary of the Sioux Indian Reservation as low water mark on the eastern bank of the Missouri River, from the 46th parallel of north latitude, to where the northern line of the State of Nebraska strikes the river, with the exception of retaining for the use of the Indians the three small existing reservations on the east bank of said river.

[fol. 89] This left open for settlement a large tract of country bordering on the east bank of the Missouri River, not embraced in the reservations retained.

The ready access to the Indians thus obtained was taken advantage of by white men who infested the country for the purpose of carrying on the liquor traffic; and in 1874, and in 1875, this traffic had gained such proportions that it was deemed necessary to take some positive steps to suppress it, accordingly the Executive Orders of January 11th, 1875 and May 20th, 1875 (Report 1878, pp. 247, 248) were issued, extending the eastern boundary of the reservation, to the 99 degree of west longitude, from the 48 parallel of north latitude, to the Missouri river, including the small tract of country South, of an east and west line, from the north-west corner of the Yankton Reservation to said 99 degree of longitude.

These orders effectually cut off all unlawful communications with the Indians on the Missouri, and to a great extent accomplished the object desired, viz: the prevention of the sale of whisky to the Indians.

It is the opinion of this office that the restoration to the public domain of the whole or any part of the lands bordering on Missouri set apart by the Executive Orders above referred to, would again open, and give renewed life to this unlawful traffic, and be detrimental to the best interests

of the Indians, and I must therefore respectfully decline to recommend any change in or modification of the boundar-
[fol. 90] ies of the reservation as now existing.

The letter of Mr. Street is, herewith, returned, and the return of his letter addressed to this office is respectfully requested.

Very respectfully, Your obedient servant, E. J. Brooks, Acting Commissioner.

Finch

[fol. 91] DEFENDANT'S EXHIBIT No. 35

"L"
Dakota
S 856 1879

June 27, —9.

The Honorable, the Secretary of the Interior.

SIR:

Referring to Office report of the 6th instant, declining, for reasons stated therein, to recommend the restoration to the public domain of the lands set apart, as an addition to the Sioux Indian reservation in Dakota, by Executive Orders dated January 11th, March 16th, May 20th, 1875, and November 28th, 1876, I have the honor to state that, after a careful reconsideration of the subject, this office is of the opinion that the lands set aside by the above named Executive Orders, with the exceptions hereinafter named, might be restored to the public domain, and the interests of the Indians still be protected.

These lands were set apart for the purpose, as alleged, of preventing illegal liquor traffic with the Indians. At the time, said lands were set apart there was no law providing a punishment for the sale of liquor to Indians, "except to Indians in the Indian country", but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liable to a penalty of $300, and two years imprisonment, and, therefore, the necessity for so large a reservation for the
[fol. 92] protection of these Indians, in this respect does not now exist.

Those Indians located at the Crow Creek and Lower Brule agencies, are protected by the Winnebago and Crow Creek

reservations, established by treaty. The remaining agencies, to wit, Cheyenne, Grand River, and Standing Rock, can be sufficiently protected by excepting from the order restoring to the public domain, the lands heretofore reserved, the following tracts, to wit: Beginning at the north-east corner of Ft. Sully Military reservation, thence due north to the Missouri River, also beginning at the mouth of the Bois Cache; thence due north to the Missouri River; and also, townships 129, 130, 131, and that part of township 132, north, lying south of Beaver Creek, Range 79 west, bordering on the Missouri River.

I, therefore, have had prepared and submit, herewith, a draft of an Executive Order, returning to the public domain the lands set apart by the Executive Orders above referred to, with the exceptions hereinbefore mentioned.

Very respectfully, Your obt. servt., E. A. Hayt, Commissioner.

(Maxwell)

[fol. 93] DEFENDANT'S EXHIBIT No. 36

Department of the Interior

WJV.

Washington, Aug. 11th, 1879.

The Commissioner of Indian Affairs.

SIR:

I transmit, herewith, an Executive Order of the 9th instant, restoring to the public domain, certain lands in Dakota Territory, heretofore reserved for the purpose of preventing illegal liquor traffic with the Sioux.

This was the subject of your letter of 27th of June last, presenting draft for such order.

A copy of the order has this day been referred to the Commissioner of the General Land Office, for his information.

Very respectfully, C. Schurz, Secretary.

(1228)
1 enclosure.

[fol. 94] DEFENDANT'S EXHIBIT No. 37

Department of the Interior

Office of Indian Affairs

Washington, D. C., March 14, 1884.

Land
1102-1105 '84
3971-4877
10154, 1884.

The Honorable, The Secretary of the Interior.

SIR:

By Executive Orders dated, respectively, January 11, March 16, and May 20, 1875, and November 28, 1876, certain tracts of country east of the Missouri River in Dakota, were withdrawn from sale and settlement and set apart as additions to the Great Sioux Reservation, established by treaty of April 29, 1868, the object being the suppression of the liquor traffic with the Indians of said reservation.

By a subsequent order—dated August 9, 1879—all the territory withdrawn by the orders abovementioned was restored to the public domain with the exception of three small tracts,—one opposite the Standing Rock Agency, one opposite the mouth of Grand River, and one opposite the mouth of the Big Cheyenne River.

It was thought best at that time to retain the three tracts referred to as a means of protection to the agencies on the other side of the Missouri—the Standing Rock, Grand River, and Cheyenne River Agencies.

The Grand River Agency no longer exists, and the agents at Standing Rock and Cheyenne River Agencies report that the Executive additions opposite their respective agencies are no longer required for the purpose for which they were originally intended, and recommended that they be restored to the public domain.

[fol. 95] I have before me two petitions numerously signed by settlers, praying for the restoration of the lands opposite Grand River and the Cheyenne River Agencies. They were presented by Hon. John B. Raymond, Delegate from Dakota, with an urgent recommendation for the opening of the lands to lawful settlement. Upon receipt of said

petitions, I took pains to ascertain whether the three reserved tracts, or either of them, are longer needed for the purpose for which they have thus far been retained, and I am satisfied that they are not. The agent at the Standing Rock Agency so declares as regards the tract opposite his agency and the one opposite the old Grand River Agency, and the agent at the Cheyenne River Agency as regards the one opposite that agency.

Under date of March 11th (instant) you referred a letter to this Office from Hon. Angus Cameron, asking in behalf of settlers whether the lands opposite Grand River could not with propriety be restored to the public domain. He states that the adjoining lands are occupied by actual settlers who are anxious to have the reserved lands opened to settlement, and he sees no good reason whey they should not be.

Having fully considered the matter I respectfully recommend that the three several tracts referred to be restored to the mass of the public domain, and in furtherance of this purpose I have had a draft of an Executive Order prepared and enclose the same herewith, together with a map upon which the several reservations are laid down.

The letter of Senator Cameron is returned with this report.

Very respectfully, Your obedient servant, H. Price, Commissioner.

(Larrabee)

[fol. 96] DEFENDANT'S EXHIBIT No. 38

United States Senate, Room of the Committee on Claims

Washington, D. C., March 8, 1884.

Hon. Henry M. Teller, Secretary of the Interior.

SIR:

There is a small reservation established by Executive order in Dakota on the east side of the Missouri river being a part of fractional township 123, range 79. There formerly was an Indian Agency at the mouth of the Grand River, opposite the reservation above mentioned. The reservation when established was of considerable extent,

but all except this fractional township has been restored to the public domain.

I presume this small remnant of the reservation was not restored to the public domain for the reason that it was opposite the then Indian Agency at the mouth of Grand River; but inasmuch as that agency has been discontinued, I can see no good reason for not restoring the present reservation to the public domain.

There is not, and has not been for years a single Indian upon this reservation. They do not seem to know and I think do not know that it was not restored to the public domain with the remainder of the original reservation. The land adjoining this reservation is occupied by actual settlers and they very much desire that this small remainder of the reservation shall be thrown open for settlement.

Will you please have the matter examined and advise me whether or not, in your opinion, the Executive order establishing this reservation ought to be revoked and the land thrown open for settlement.

Truly yours, Angus Cameron.

[fol. 97] DEFENDANT'S EXHIBIT No. 39

RVB Department of the Interior W.H.C.

Washington, March 22, 1884.

The Commissioner of Indian Affairs.

SIR:

I transmit, herewith, an Executive Order of the 20th, inst. restoring to the public domain certain lands therein described situated on the East side of the Missouri River in Dakota Territory, heretofore withdrawn and made Executive additions to the Sioux reservation as therein noted; which Order was the subject of recommendation in your letter of 14th. instant.

The enclosures of your letter are also herewith, returned.

Very respectfully, C. U. Joslyn, Acting Secretary.

AYC.

1117 Ind. Div. '84.

3 enclosures.

The enclosures referred to above were the Ex order and letter of Senator Angus Cameron 4877—which letter is filed in its proper place and order in the files.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 46,126. Court of Claims. Term No. 798. The Sioux Tribe of Indians, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed December 12, 1941. Term No. 798, O. T., 1941.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 9, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 12 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

RALPH H. CASE,
Counsel for Petitioner.